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No. 96-976

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
I. THE COURT SHOULD DECIDE THE DOUBLE JEOPARDY QUESTION PRESENTED BASED UPON THE PUNISHMENT ACTUALLY IMPOSED ON PETITIONERS AND THE GOAL THE PUNISHMENT SOUGHT TO ACHIEVE	1
II. THE JEOPARDY QUESTION AT ISSUE HERE INVOLVES JEOPARDY OF MULTIPLE PUNISHMENT, NOT JEOPARDY OF MULTIPLE PROSECUTION	6
III. THE DISTINCTION THE COURT HAS DRAWN BETWEEN REMEDIAL AND PUNITIVE ACTIONS SHOULD NOT BE ALTERED	11
IV. THE ORDER OF PROCEEDINGS DOES NOT MATTER	17
V. THE APPROPRIATE "SAME OFFENSE" TEST HAS BEEN MET	18
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Blackledge v. Perry, 417 U.S. 21 (1974)	17
Blockburger v. United States, 284 U.S. 299 (1932)	18, 19
Breed v. Jones, 421 U.S. 519 (1975)	2
Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962)	15
Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994)	*passim*
Helvering v. Mitchell, 303 U.S. 391 (1938)	6, 7, 8
Hicks v. Feiock, 485 U.S. 624 (1988)	3, 6
Kansas v. Hendricks, 117 S.Ct. 2072 (1997)	18
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	9
Motor Vehicle Mfg. Ass'n v. State Farm Mutual Automobile Ins., 463 U.S. 29 (1983)	15
Republic Steel Corp. v. National Labor Relations Board, 311 U.S. 7 (1940)	12, 15
Rex Trailer Co. v. United States, 350 U.S. 148 (1956)	13
S.A. Healy Co. v. OSHRC, 96 F.3d 906 (7th Cir.)	*passim*
Stockwell v. United States, 80 U.S. (13 Wall.) 531 (1871)	8
Trop v. Dulles, 356 U.S. 86 (1958)	2
United Parcel Service v. Mitchell, 451 U.S. 59 (1981)	18
United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943)	12, 18
United States v. Chouteau, 102 U.S. 603 (1881)	7, 11, 18
United States v. Gates, 25 F. Cas. 1263 (S.D.N.Y. 1845)	10, 11
United States v. Halper, 490 U.S. 435 (1989)	*passim*
United States v. La Franca, 282 U.S. 568 (1931)	*passim*
United States v. McKee, 26 F. Cas. 1116 (C.C.E.D. Mo. 1877)	10, 11
United States v. Reorganized CF&I Fabricators of Utah, 116 S.Ct. 2106 (1996)	5
United States v. United Mine Workers, 330 U.S. 258 (1947)	3
United States v. Walker, 940 F.2d 422 (9th Cir. 1991)	15, 16

TABLE OF AUTHORITIES—Continued

	Page
United States v. Ward, 448 U.S. 242 (1980)	8, 9
Waterloo Distilling Corp. v. United States, 282 U.S. 577 (1931)	18, 19
Wisconsin v. Gould, Inc., 425 U.S. 282 (1986)	6
Statutes, Rules and Constitutional Provisions	
12 U.S.C. § 93(b)	9, 10, 11, 14
12 U.S.C. § 504	9, 10, 11, 14

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I. THE COURT SHOULD DECIDE THE DOUBLE JEOPARDY QUESTION PRESENTED BASED UPON THE PUNISHMENT ACTUALLY IMPOSED ON PETITIONERS AND THE GOAL THE PUNISHMENT SOUGHT TO ACHIEVE

(1) Respondent does not squarely address the punishment actually imposed upon petitioners by the Office of the Comptroller of the Currency ("OCC") in this case: substantial monetary penalties *and* lifetime bars from participation in the banking industry.[1] The government passes over the evidence *from OCC itself* that these two-

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[1] Under the "non-participation" orders, petitioners are barred from the industry absent the "prior written consent" of the regulatory agencies (Pet. App., p. 197a, *et seq.*).

pronged penalties had been imposed on petitioners with the goal of "preventing these individuals from ever reentering the banking industry *and*, through publicity of these actions, hopefully deter *other individuals* from similar conduct." Pet. App., p. 13a (emphasis added).[2] The government, instead, discusses what are now described as "conduct-shaping" penalties imposed to "induc[e] compliance with regulatory objectives." (*e.g.*, Br., p. 9-10, 23-24). At the same time, respondent repeatedly expresses concern that acceptance of petitioners' submission would require the government to "elect" between civil and criminal penalties, thereby "hampering the flexible use of civil money penalties" (Br., p. 14, 24, 34).

As to the first point, the money penalties in this case are not "conduct-shaping," were not imposed to "encourage compliance with a regulatory regime" (Gov. Br., p. 16) and cannot be justified by simply asserting there is a "rational connection" between imposing money penalties and the "goal of protecting the banking system." (Gov. Br., p. 38). *See, e.g., Trop v. Dulles*, 356 U.S. 86, 95 (1958) (Plurality): The "penal effect" of "a statute providing that 'a person shall lose his liberty by committing bank robbery' . . . [would not] be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers." As to the latter point, there are three responses. First, the asserted desire for "flexibility" should not justify a declination to apply the Double Jeopardy Clause. In *Breed v. Jones*, 421 U.S. 519 (1975), for example, the Court unanimously rejected the contention the Clause should not apply to juvenile court proceedings because juvenile proceedings are designed to benefit

[2] Contrary to the government's intimation (Gov. Br., p. 33), the district court did not conduct any "inquiry into the subjective purposes" that motivated the OCC. The district court simply reviewed the testimony presented, received the exhibits offered into evidence and made factual findings accordingly. There is nothing "subjective" about such straightforward fact finding.

youthful offenders and imposing double jeopardy scrutiny "'would diminish the flexibility . . . of juvenile court proceedings. . .'." *Id.*, at 532. The "burdens" envisioned could not, the Court held, "justify a departure . . . from the fundamental prohibition against double jeopardy." *Id.*, at 537. Second, the government's concern with regard to "hampering . . . flexible . . . penalty schemes" (Gov. Br., pp. 27-28) has no application to this case—there is nothing "flexible" about the penalties imposed upon petitioners. Third: a genuinely "flexible" money penalty would almost surely be remedial, rather than punitive, in nature. The facts of this case offer an excellent illustration of the last point.

OCC believed petitioners were responsible for certain lending violations at banks petitioners controlled. The alleged violations, among other things, reduced the capital of the banks below mandatory minimum levels. If OCC had ordered petitioners to correct the existing deficiencies within a stated period of time and, thereafter, to pay to the bank at which the violations continued the sum of $1,000 for each day the violations went uncorrected, the sanction would very likely be held remedial.

The obvious analogy would be to the law of contempt. The Court has long held that the two most important benchmarks in determining whether a contempt proceeding is remedial or punitive are the identity of the party to whose benefit the order inures and the indeterminate nature of the sanction. If the order benefits primarily the party suffering injury, rather than the government, and if the penalty may be avoided by compliance, the proceeding is remedial. *Hicks v. Feiock*, 485 U.S. 624, 633 (1988) ("'[o]ne who is fined unless by a day certain he [does the act ordered] has it in his power to avoid any penalty'"); *Accord, United States v. United Mine Workers*, 330 U.S. 258, 304 (1947). If OCC had imposed such a sanction, the criteria for "remediation" would appear to be present:

the order would benefit the allegedly aggrieved party (the bank) and the penalty could be avoided by compliance.

The government contends (Gov. Br., p. 18) that "the double jeopardy analysis must be tailored to the nature of the sanction at issue." Assuming for the argument that this premise may be valid, the money penalties in *this* case *could not* have had "the goal of . . . 'motivating future behavior' " (*id.*) of petitioners. Since petitioners were barred from participating in the banking industry, the additional exaction of fixed money penalties for alleged *past* acts could have had *no* non-punitive purpose. And, as *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 779 (1994) and *United States v. Halper*, 490 U.S. 435, 447-48 and n.7 (1989) hold, the multiple punishment issue depends upon the "*purposes actually served* by the sanction in question . . . *as applied in the individual case.*" (emphasis added).

In *this* case, the district court found (Pet. App., p. 14a), that "the monetary penalties [imposed upon petitioners] were punitive in nature." The government does not challenge the sufficiency of the evidence supporting this finding. Indeed, only in a passing footnote (Gov. Br., p. 27, n.17) does the government advert to the actual sanctions imposed upon petitioners here. The government acknowledges that, given the non-participation orders, petitioners are "no longer . . . in a position to commit further violations. . . ." But the government states, this "does not convert the deterrent impact of the civil penalties into punitive sanctions." (*Ibid.*) The assertion is an obvious *non sequitur:* once petitioners were barred for life from participating in the banking industry, the imposition of monetary penalties for alleged past acts on top of the bar orders could have had *no* purpose other than to impose retribution and to publicize the fact of that retribution as an example to others. The goals of retribution and of creating an example of a defendant in order to deter others go to the core of the concept of "punishment" as it is

known in our society. *See, e.g., Halper*, 490 U.S., at 440-41; *United States v. Reorganized CF&I Fabricators of Utah*, 116 S.Ct. 2106, 2113 (1996).

(2) The penalties at issue here are different in kind, not merely in degree, from monetary remedies designed to afford the government full financial compensation for an injury or to deprive a wrongdoer of "ill-gotten" gains. The penalties here were imposed even though "the United States was not a victim . . . and therefore none of the fines can be justified as a remedy." *S.A. Healy Co. v. OSHRC*, 96 F.3d 906, 910 (7th Cir.) *pet. for cert. pending*, No. 96-1299. As Judge Easterbrook explained, fines imposed under a statute which *requires* an evaluation of punitive factors—the seriousness of the alleged misconduct, whether the defendant has previously committed similar violations and the defendant's ability to pay—constitute a "*means* [of enforcement which] is punitive, even though the *end*" may be beneficient. (*Id.*, at 911).

(3) Recognition of the proper result on the facts here, moreover, would not have the sweeping and dire consequences predicted by respondent (*see*, Gov. Br., pp. 14, 24). As discussed above, the regulatory agencies presumably may impose truly "flexible," remedial civil money penalties analogous to the indeterminate orders issued regularly in civil contempt cases. Moreover, the government will remain free to seek nonparticipation or "bar" orders banning a defendant from participation in a regulated industry. In instances in which the government has suffered a pecuniary loss to a property or proprietary interest, it may seek compensation (including double damages) through any of the numerous statutes which Congress has enacted for that purpose. In a proper case, the government may also seek to recover "ill-gotten" gains. In this case, however, the government suffered no financial injury from the alleged acts of petitioners; was not seeking to require any form of "disgorgement"; had already achieved all the deterrence of petitioners which is possible; and had imposed

"unconditional penalt[ies] . . . which [are] exclusively punitive in character." *Hicks*, 485 U.S., at 633.[3]

II. THE JEOPARDY QUESTION AT ISSUE HERE INVOLVES JEOPARDY OF MULTIPLE PUNISHMENT, NOT JEOPARDY OF MULTIPLE PROSECUTION

(1) The protection against multiple prosecution and the protection against multiple punishment are distinct and require discrete analysis. *Compare, United States v. La Franca*, 282 U.S. 568 (1931) *with, Helvering v. Mitchell*, 303 U.S. 391 (1938).

It is the methodology of *La Franca*, a multiple punishment case, rather than *Mitchell*, a multiple prosecution case, which is relevant here. Like petitioners in this case, the defendant in *La Franca* did *not* contest the validity of the fine imposed in the prior proceeding; *nor* did he contest the use of a civil proceeding—as opposed to a criminal prosecution—to obtain punishment. Rather, the defendant argued that the protection against multiple punishment precluded a second fine for the same conduct, regardless of the label—civil or criminal—put upon the proceedings. The Court unanimously agreed. To avoid the "grave constitutional question" that would be presented if the defendant were punished a second time, the Court

[3] Petitioners do not here contend that imposition of the non-participation sanctions, alone, would necessarily have precluded a subsequent indictment, because it is unnecessary to do so in this case. It should be noted, however, that while "courts have understood [*United States v.*] *Halper* [490 U.S. 435 (1989)] to allow debarment sanctions . . . for the purpose of protecting the banking system and financial markets . . . from future harm" (*Healy*, 96 F.3d at 911), the government errs in the unqualified assertion that debarment can never constitute punishment. In *Wisconsin v. Gould, Inc.*, 475 U.S. 282 (1986) the Court unanimously held that a "debarment law which function[ed] unambiguously as a . . . sanction for violations of" a federal statute was "punishment." *Id.* at 288 and n.5.

construed a statutory provision barring further "prosecution" of those convicted under a criminal statute to preclude the civil action as well. The Court "assume[d]" that such a "penalty may be recovered in a civil action as well as a criminal prosecution . . . ." The assumption, however, did not assist the government because, *regardless* of whether the punishment was imposed in a civil or criminal action, "it is still . . . punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and *its character is not changed by the mode in which it is inflicted*, whether by a civil action or a criminal prosecution. *Id.*, at 573, *quoting, United States v. Chouteau*, 102 U.S. 603, 611 (1881) (emphasis supplied).

Mitchell, a case involving the protection against multiple prosecution, presented a substantially different question, and generated a correspondingly different analysis. The defendant in *Mitchell* had been indicted for tax fraud. He was acquitted. Thereafter, the government brought a proceeding against the defendant to recover unpaid taxes together with a fifty percent enhancement for taxes whose payment had been evaded by fraud. Since the first proceeding against the defendant had ended in an acquittal, there was no issue of multiple punishment in the case. Rather, the defendant could prevail only by demonstrating that the second proceeding was *inherently* criminal.

The Court concluded that this heavy burden was not met. The focus was upon the "nature" of the action and the "purpose" of Congress, rather than upon the defendant, because there was no issue of multiple punishment. By contrast, in a case such as *La Franca*, as here, the question was simply whether the defendant had been previously punished.

The government's failure to draw this distinction leads it to several erroneous, or irrelevant, conclusions. Thus, the government suggests that civil money penalties should not be held to be "inherently criminal" (Gov. Br., p. 21) because the courts have "uniformly" permitted the collection

of such penalties "by civil proceedings." (*Id.*, pp. 22, 26). Yet, as the government recognizes, these holdings resulted from "claims that [the] penalties could *only* be collected through criminal proceedings." (Gov. Br., p. 22). (emphasis supplied).

A contention that *all* proceedings under a nominally civil statute must be deemed to be "inherently" criminal is a sweeping one. It is, therefore, understandable that the Court has insisted upon the "clearest proof" before reaching such a conclusion. *United States v. Ward*, 448 U.S. 242, 249 (1980). We emphasize that *no such question* is presented here. Petitioners do not challenge the imposition of punishment by OCC on the theory that the punishment could only be obtained through a criminal prosecution. Petitioners assert only that, on the facts of *this* case, the proceeding before the Comptroller *resulted* in punishment, regardless of "the mode by which it [was] inflicted." *La Franca*, 282 U.S., at 573.[4]

(2) The claim asserted by petitioners here cannot be answered by reference to cases such as *Ward* or *Mitchell*. Indeed, in *Halper*, the Court was unanimous in holding that the "abstract approach" of *Ward* was not well suited to the "context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." 490 U.S., at 447. Rather, a multiple punishment claim can be resolved "only by assessing the character of the actual sanctions imposed. . . ."[5] *Ibid.* Thus,

[4] The holding of cases such as *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 541 (1871) that Congress has the power to authorize a civil action to collect penalties for illegal importation of goods although "an indictment or information [for same violation] might be sustained" is assuredly not a holding that both "modes" of proceeding could be invoked and the penalty recovered twice.

[5] Oddly, while the government relies upon the "test" of *Ward* (Gov. Br., p. 25) the government never mentions the fact that this

the list of criteria set forth in *Ward*, relying upon *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), does not apply here.[6]

If, however, the *Ward* factors are thought to have any relevance to the present case, it is important to bear in mind that the government's discussion does not address the facts of *this* case. Thus, the government states that penalties under 12 U.S.C. §§ 93(b) and 504 do not require a finding of *scienter* and may be imposed for mere negligence (Gov. Br., pp. 28-29). The OCC does not agree. OCC's position is that penalties as serious as those imposed upon petitioners are reserved for cases of alleged "willful misconduct" only. (Pet. App., p. 62a). The government's suggestion (Gov. Br., p. 28) that the fines might have been imposed for the purpose of "deterrence" and "to remove a profit incentive . . . to encourage *ongoing* compliance with the law" is *entirely* unsupported by the record. Since petitioners were banned from the industry, fines for alleged past acts self-evidently could serve neither as a "deterrent" nor to "encourage *ongoing* compliance" with a regulatory scheme governing the very industry from which petitioners had been barred. (emphasis supplied).

The government's failure to address the actual punishment imposed in this case is particularly striking in light of the emphasis of the Court in both *Halper* and *Kurth Ranch* that, in this context, the question whether a given sanction is a "punishment" can be answered only by "a particularized assessment" (*Halper*, 490 U.S., at 448) of the penalty imposed "*as applied in the individual case*."

is the same position which it took in *Halper* (490 U.S. 446-47) and which the Court rejected.

[6] The distinction between the two situations is highlighted by the fact that neither *Ward* nor *Mendoza-Martinez* involved any double jeopardy claim at all. *Ward* considered whether a nominally civil proceeding was sufficiently penal to trigger the self-incrimination clause; *Mendoza-Martinez* presented the question whether certain punishments are so drastic that they may only be imposed in criminal proceedings.

(*Ibid.*). This "evaluation of the *purposes actually served*" (490 U.S., at 447, n.7) by such sanctions necessarily requires a case-by-case inquiry. *Id. Accord, Kurth Ranch*, 511 U.S. 779. The "evaluation" required by this Court's precedents of the facts actually presented by the record is what petitioners seek.

Thus, the government's request (Gov. Br., p. 30) that penalties imposed under 12 U.S.C. §§ 93(b) and 504 not be held to be "invariably and inherently 'punitive'." misses the relevant point. Petitioners do not assert that penalties under sections 93(b) and 504 are "invariably and inherently 'punitive'." Indeed, we have offered above an example of a "flexible" use of these statutes which could reasonably be deemed remedial. Petitioners contend only that the "particularized inquiry" into the "purposes actually served" by the penalties imposed in this case demonstrates that the impositions here were "punishment" for double jeopardy purposes.

(3) The government's recapitulation of the enactment of money penalty statutes by early English and American legislatures (Gov. Br., pp. 21-23) arrives at the wrong answer because it asks the wrong question. The issue is *not* whether a civil proceeding may be used to collect money penalties. The relevant inquiry is whether the Double Jeopardy Clause was understood to permit *both* a proceeding to collect a monetary penalty in civil proceedings *and* an additional punishment in a separate proceeding.

The answer appears clearly to be negative. While there are few reported cases squarely addressing the point, the two opinions upon which the *La Franca* Court relied (282 U.S., at 574)—*United States v. Gates*, 25 F. Cas. 1263 (S.D.N.Y. 1845) and *United States v. McKee*, 26 F. Cas. 1116 (C.C.E.D. Mo. 1877)—both upheld the proscription against multiple punishment in proceedings brought by action or indictment following previous convictions for the same acts.

Gates held the government could not again impose money penalties upon the defendant regardless of whether the government brought its case "by action" on the civil side of the court or "by indictment" on the criminal side. 25 F. Cas., at 1266: "The facts declared upon as the foundation for the penalty . . . being the same for which the defendant had already been . . . punished . . . the plea [of jeopardy] . . . is good. . . ." *Id.*, at 1267.

The same result obtained in *McKee*. There, Justice Miller sitting on Circuit, held that the Double Jeopardy Clause barred a civil action for aiding and abetting tax fraud after the defendant had pled guilty to conspiracy to defraud in a separate proceeding.

Four years after *McKee*, this Court unanimously stated in *United States v. Chouteau*, 102 U.S. 603, 610-611 (1881) that a second attempt to punish a defendant, by a "civil action" or a "criminal prosecution . . . based upon the same transactions," was barred under the circumstances there presented. Thus, to the extent history is relevant here, it appears to support petitioners, not the government.[7]

III. THE DISTINCTION THE COURT HAS DRAWN BETWEEN REMEDIAL AND PUNITIVE ACTIONS SHOULD NOT BE ALTERED

We argued (Pet. Br., pp. 3-34) that the Court has never sustained as "remedial" a penalty imposed merely to defray the cost of a governmental investigation of third parties.

The government's response is that there is "no basis" for distinguishing between losses to the government's own "financial interests" and the costs incurred when the government has decided to investigate possible "harm done to the public." (Gov. Br., p. 34). This extraordinary contention is contrary to settled principles of law. In addition,

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[7] The relevance of the arcane statutes listed in the government's brief is dubious, at best. 12 U.S.C. §§ 93(b) and 504 were not enacted until 1974 and have no common law heritage.

it would render the "humane interests served by the Double Jeopardy Clause's proscription of multiple punishments" (*Halper*, 490 U.S., at 447) a practical nullity. For both reasons, it should be rejected.

(1) The Court has long emphasized there is a "line" between "remedial actions brought primarily to protect the government from financial loss" and punitive sanctions "intended to . . . vindicate public justice." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 (1943). The Court has never varied from the "line" referred to in *Hess*. As recently as *Kurth Ranch*, the Court held a second punishment barred because the "formula by which [the State] computed [the penalty] would have been the same regardless of the amount of the State's damages and, indeed, regardless of whether it suffered any harm at all." 511 U.S. 767, 789-90 (1994).[8]

Nor is this all. *Halper* itself would presumably have been decided in favor of the government if the government had been allowed to include in its calculation of "injury" such abstract, amorphous and infinitely manipulable "criteria" as "the integrity of the [existing] system" (Gov. Br., p. 34) or the government's "programmatic" concern to protect the "public interest." (*Ibid.*). This issue was not discussed in *Halper*. But the Court long ago rejected such an argument in a related context. *See, Republic Steel Corp. v. National Labor Relations Board*, 311 U.S. 7 (1940).

Republic Steel appears to be the only instance in which the Court has directly confronted an administrative order from a government agency directing a private entity "pay to governments what [governments] had paid to employees for services rendered. . . ." *Id.*, at 12. In *Republic Steel*, the employer had violated the National Labor Relations

[8] In a footnote (Gov. Br., p. 34, n.21), it is suggested in passing that petitioners may have caused a loss to the FDIC insurance fund. The government did not seek to employ this theory below, however, and neither the district court nor the court of appeals considered the point.

Act by wrongfully discharging certain of its employees. The discharged employees were, thereafter, employed by various federal, state and local agencies formed to assist the unemployed. The NLRB ordered the employer to rehire the employees with back pay. The Board also ordered payments to the respective government agencies in the amount which the agencies had paid as salaries to the former employees. In striking down the latter part of the order, the Court observed that the payments mandated were based upon the theory of redressing, not an injury to particular persons, "but an injury to the public". So conceived, "these required payments are in the nature of penalties. . . ." *Id.*, at 10. Nor could the government's interest in protecting public programs to aid the employed or in deterring violations of federal labor law change the result. "[I]t is not enough . . . that the [agency's] order . . . would have the effect of detering persons from violating the Act. That argument proves too much. . . ." *Id.*, at 12.

The sole decision of the Court offered by the government as authority for the contention that a concept so amorphous as "impairment of the government's programmatic concern for . . . the public interest" is within the concept of a "loss" (Gov. Br., p. 34) to the government for relevant purposes is *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956). *Rex Trailer*, however, was a case in which the Court held it to be "obvious . . . that injury to the government resulted from [the] fraudulent purchase of trucks [owned by an agency of the government]. 350 U.S., at 153.[9]

[9] The unusual facts of *Rex Trailer* highlight its lack of relevance here. In *Rex Trailer*, the defendant had obtained surplus government property by fraud. The Court construed the statutory remedy invoked by the government as "comparable to" a liquidated damages clause in a contract which obviated proof of specific items of loss, 350 U.S. at 153-54. The Court carefully limited this approach to the facts appearing "on this record." *Ibid.*

(2) In both *Halper* (490 U.S., at 441) and *Kurth Ranch* (511 U.S., at 782) the Court spoke forcefully in describing the preclusion of multiple punishments, "a constitutional protection that has 'deep roots in our history and jurisprudence'." But the government's position, if accepted, would reduce this "deeply-rooted" protection to a mere form of words—*any* punishment can be labeled "remedial" in relation to an abstract aspirational good such as "protect[ing] . . . the public interest." As Judge Easterbrook observed in *Healy*, (96 F.3d, at 911), however, the question is not whether a government program serves a "beneficient purpose" but whether the purpose is achieved by a "*means* [that] is punitive." [10]

(3) The government argues (Br., pp. 32-33) it should be allowed to seek a second punishment of petitioners in a separate proceeding by, in effect, offsetting the money penalties imposed upon petitioners in the amount of "cost of investigation and administration." The contention is unsound. This is so, in addition to the reasons previously discussed, because Congress has not authorized OCC to consider such costs in determining penalty amounts under 12 U.S.C. §§ 93(b) and 504; OCC did not purport to consider such "costs" in assessing the monetary penalties imposed; and allowing such a *post hoc* "computation" of government "costs"—more precisely, of the cost of actually operating part of the government itself—would reduce the protection against multiple punishment to an empty promise.

The Court has never, to the best of our knowledge, permitted an administrative imposition of "investigatory costs" in the absence of a statute explicitly authorizing such an

[10] The repetitive emphasis on "serving" or "promoting" the "public interest" (*e.g.*, Gov. Br., pp. 9, 12, 25, 34) seems most peculiar. It is to be hoped the government believes *all* actions which it initiates meet that standard. This, however, has little connection with the double jeopardy issue presented here.

award when the government has suffered economic injury or a statute which necessarily contemplated recovery of such costs through a double-damage provision, or the like. Indeed, while the Court has sometimes allowed an agency to consider issues of "monetary and other costs" in reaching a decision (*Motor Vehicle Mfg. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 55 (1983)), the Court has never approved "attributing" such costs to private parties. *Cf.*, *Republic Steel*, 307 U.S., at 12.

Nor has the Court upheld administrative action on a theory which the agency did not even consider. *See, e.g.*, *Motor Vehicle Manufacturers Association*, 463 U.S., at 54 ("an agency's action must be upheld, if at all, on the basis articulated by the agency itself"). The Court has always insisted that it will not accept "*post hoc* rationalizations" by government counsel. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The same rule should apply in the context of this case.

(4) The license to create *post hoc* justifications which the government seeks—especially when unconstrained by clear statutory criteria—inevitably produces a level of arbitrariness and manipulation that is unacceptable. The Seventh Circuit squarely addressed this point in *Healy*, 96 F.3d at 910-11. The "investigatory-costs-equals-remedial-result" notion, if upheld, would mean, as Judge Easterbrook aptly put it, that the government may free itself "from double jeopardy concerns provided [only that its] investigation is costly enough." 96 F.3d, at 910. Since the government alone decides the amount to expend on a given undertaking, this rationale would inevitably mean that a defendant "could be dogged for eternity by additional penalties for the same misconduct." *Id.*

The present case and *United States v. Walker*, 940 F.2d 422 (9th Cir. 1991) offer examples of the validity of the concerns expressed in *Healy*. In petitioners' case, the government originally took the position that it did not need to justify the penalties previously imposed at all. After the

court of appeals disagreed, the government concocted the artificial "salary and benefits" theory previously discussed.

In *Walker*, however, the "salary and benefits" notion would not have produced the result the government wished to obtain. The defendant in that case had entered the United States without declaring he was in possession of one gram of marijuana. For this offense, he was summarily fined by the Customs Service and, thereafter, indicted. The Customs Service had located the marijuana in a routine airport inspection lasting only a short time and "costing" the government virtually nothing. The government, therefore, simply broadened its concept of "cost": it urged that the defendant's double jeopardy claim be rejected because of the cost of "administering the customs system" itself! 940 F.2d, at 447. A majority of the panel accepted this argument. Dissenting, Judge Noonan demonstrated that allowing the government to "attribute" to a defendant a portion of the cost of operating an entire department or agency of the government renders the protection against multiple punishment a dead letter. *Ibid. Accord, Healy*, 96 F.3d, at 911 ("if . . . only the goal . . . matters then Healy's [previous] criminal fine was not punishment').

The government's position in this Court illustrates the point; the government contends it should be allowed to "allocate" to petitioners portions of the salaries and benefits paid to government employees because "the government's need to retain such employees . . . results from the existence of violators, such as petitioners." (Gov. Br., p. 35, n.22). This is sophistry. Of course, government *ultimately* depends upon population; Antarctica does not have the latter and, therefore, does not need the former. But this Court's double jeopardy jurisprudence has never turned on a shibboleth such as is now offered by the government.

IV. THE ORDER OF PROCEEDINGS DOES NOT MATTER

The government's theory that the constitutional protection against multiple punishment may only be invoked when a civil penalty proceeding follows a criminal trial is flawed. The argument is premised upon a transformation of *Halper* from a case concerned with multiple punishment into a case in which exposure to "punitive civil sanctions" impinged upon a defendant's "interest in [the] finality" of his criminal sentence. (Gov. Br., pp. 37-38). There is not a hint of such a theory in the *Halper* opinion. If the *Halper* Court had intended to decide the question there presented on the extraordinary ground that imposition of a civil penalty compromised the defendant's "legitimate expectation" in the "finality" of a previous criminal judgment, the Court would, doubtless, have so stated. But the Court said nothing of the sort.

The only reason the government offers for its "order of proceeding" contention is that a punitive civil penalty which follows a criminal prosecution may be sought because of a regulator's dissatisfaction with the criminal sentence. (Gov. Br., p. 38). There is no indication such a hypothetical has ever occurred. Moreover, if it ever came about, the defendant would be entitled to a dismissal of the proceeding on due process grounds without regard to double jeopardy issues. *See, Blackledge v. Perry*, 417 U.S. 21 (1974).[11]

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[11] The footnote in *Halper* to which the government refers (490 U.S., at 451, n.10), is inapposite. Both the footnote and the text to which it is appended discuss the distinction between separate proceedings against a defendant and multiple punishments imposed in a single proceeding. There is no indication the Court thought the *order* of separate proceedings was decisive.

V. THE APPROPRIATE "SAME OFFENSE" TEST HAS BEEN MET

This Court's decisions applying double jeopardy principles in the context of civil/criminal proceedings contain a recurring theme: the appropriate inquiry is whether the two proceedings involve "the same transactions". *See, United States v. Chouteau*, 102 U.S. 603, 607, 611 (1881) ("*same subject matter and . . . the same transactions*") (emphasis by the Court); *United States v. La Franca*, 282 U.S. 568, 573 (1931) ("the identical transactions"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548 (1943) ("the same transactions"); *Cf., Waterloo Distilling Corp. v. United States*, 282 U.S. 577, 580 (1931) (describing *La Franca* as a case in which the government improperly sought two money penalties for the "same transactions."); *Halper*, 490 U.S., at 451 ("same conduct"); *Kurth Ranch*, 511 U.S. 767, 769 ("same conduct").[12]

No decision of this Court has applied the "elements" test of *Blockburger v. United States*, 284 U.S. 299 (1932) in this context. *See, Kansas v. Hendricks*, 117 S.Ct. 2072, 2086 (1997) (*Blockburger* "simply does not apply outside of the successive prosecution context.") This case, however, presents a claim of multiple punishment to which, as noted, the Court has consistently applied a "same transaction" test.[13] The government has offered

[12] The *amicus* appearing in support of respondent suggests that *Halper* be "reconsidered." (Br. of 48 States and Territories, p. 2 and *passim*). This question was not raised below; was not presented by the petition for certiorari; and has not been argued by respondent. The Court has long been committed to the rule that an *amicus* may not raise questions which have not been addressed by the parties. *See, e.g., United Parcel Service v. Mitchell*, 451 U.S. 59, 60, n.2 (1981) and cases there cited. In any event, *Halper* is an important contemporary statement of a long-standing constitutional protection and should remain an authoritative precedent.

[13] The government intimates (Gov. Br., p. 43) that there may be tension between *La Franca* and *Blockburger*. If so, the tension appears to have escaped the attention of the Court. *La Franca*, *Waterloo Distilling* and *Blockburger* were handed down within one year. Each was written by the same author—Justice Sutherland—and each was unanimous.

no sound reason why the Court should abandon the "same conduct or transaction" test which it has applied in this context for well over a century.[14]

CONCLUSION

For the reasons stated herein and previously, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[14] The government suggests (Gov. Br., pp. 40-41 and n.23) that since the court of appeals did not reach the "same offense" issue, the Court may wish to remand for further consideration. If the Court does not accept our submission that the "same transaction" test governs this case, we agree a remand would appear appropriate.